Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF ADELPHIA BUSINESS SOLUTIONS

Adelphia Business Solutions (f/k/a Hyperion Telecommunications, Inc.) ("Adelphia"), by its undersigned counsel, submits its comments in the above-captioned proceeding.[1] Adelphia, through its affiliated networks, is a leading provider of integrated local telecommunications services over state-of-the-art, fiber-optic networks in selected markets throughout the United States.

[1] *Promotion of Competitive Networks in Local Telecommunications Markets,* WT Docket No. 99-217 and CC Docket No. 96-98, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141 (rel. July 7, 1999) ("NPRM").

Adelphia's affiliated networks currently serve 46 cities and include approximately 5,363 route miles of fiber optic cable. Since its operations began as a competitive local exchange carrier ("CLEC"), Adelphia has encountered numerous instances of abuse by building owners who prevent access or impose exorbitant fees on CLEC. Adelphia applauds this most recent effort by the Commission to ensure that CLECs have reasonable and nondiscriminatory access to multiple tenant environments ("MTEs").

I. DUE TO DISCRIMINATORY ACTIONS BY BUILDING OWNERS AGAINST COMPETITIVE LOCAL EXCHANGE CARRIERS, MANY CONSUMERS HAVE NO CHOICE IN TELECOMMUNICATIONS SERVICE PROVIDERS

Numerous end-users cannot subscribe to competitive, advanced telecommunications services, but instead must continue to receive the services of the incumbent local exchange provider ("ILEC") because of their location in MTEs. These end-users do not have a choice of local service provider; a reality that contravenes the explicit competitive mandate of the Telecommunications Act of 1996 ("1996 Act").

To provide end-to-end, facilities-based telecommunications service to MTE end-users, a utility must extend its network into and throughout a building. Thus, CLECs, such as Adelphia, approach building owners to obtain access to building spaces, which are already occupied by ILEC equipment. Many building owners either refuse access or impose exorbitant fees on the CLEC. The fees appear to have no relationship to the cost of providing access to the building facilities. Rather, in most cases, it is clear that building owner imposes these fees solely to gain a windfall. Meanwhile, the ILEC enjoys access at no cost and continues to maintain its monopoly over MTE end-users.

The building owner is a roadblock between the tenant wishing to receive the benefits of competitive telecommunications services and the carrier eager and able to provide such services. To the detriment of their occupants, building owners treat access by CLECs as a significant new revenue generating opportunity. Numerous cases of abuse by building owners have been cited by CLECs. For example, as noted in the NPRM, WinStar's Vice President for Real Estate executed an affidavit attesting to the fact that "many building owners and/or building management are requesting non-recurring fees, recurring fees, per linear foot basis charges, and a variety of other" charges that are not cost based nor imposed on the ILEC.[2] WinStar and other CLECs have described numerous incidents of building owners demanding thousands of dollars for initial access and recurring monthly fees for continued access.[3] Adelphia has encountered similar building owner abuses. In Florida, a building owner threatened to remove equipment unless Adelphia agreed to share its revenues. In Louisiana, a building owner required $25,000 up front and $2,000 per month for access to the building. Two of the largest buildings in Louisiana initially refused access to Adelphia, and then later offered access at $2000 per month. Adelphia was compelled to decline offering service to customers in these buildings.

As the Commission recognizes, "the major economic obstacle to the development of competitive facilities-based networks . . . is the extensive investment necessary to duplicate the

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[2]NPRM, at ¶31, *citing* Telecommunications Services Inside Wiring, CS Docket NO. 95-184, Comments of WinStar Communications, Inc. at Exhibit III (filed Aug. 5, 1997).

[3]NPRM, at ¶31.

existing wireline networks."[4] In many instances, the building owner's exorbitant fees make the MTE business cost prohibitive; while, to the contrary, MTE business should be a source of revenue generation rather than revenue depletion for CLECs. With approximately 30% of U.S. consumers occupying MTEs according to recent Congressional testimony,[5] MTEs are appealing to carriers that are attempting garner significant resources to support development of an end-to-end, facilities-based network. End-users, whether business or residential, who are located in MTEs are typically less expensive to serve than solitary business or residential end-users. ILECs have enjoyed, and continue to enjoy, revenue generation from MTE buildings. The ILEC typically does not pay for access and serves all MTE end-users through its monopoly. For end-to-end, facilities-based competition to become a reality, CLEC must be able to tap into this sector of the market. Thus, the Commission must establish affirmatively rules that allow CLECs to access all available consumers, especially those in MTEs.

II. WITHOUT COMMISSION ACTION, END-TO-END, FACILITIES-BASED NETWORKS THAT CAN COMPETE WITH THE TRADITIONAL ILEC NETWORK ARE UNLIKELY TO EXIST IN THE NEAR FUTURE

The history of the telecommunications industry demonstrates that competition brings about technical advancements that improve the way we live and communicate. History also demonstrates that in order to open a market bogged down in a monopoly, regulatory agencies must affirmatively

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[4]NPRM, at ¶19.

[5]Testimony of John Windhausen of ALTS on May 13, 1999 before the House Subcommittee on Telecommunications, Trade and Consumer Protection, transcript at 27. *See also Telecommunications: The Changing Status of Competition to Cable Television*, GAO/RCED-99-158. In its NPRM, the Commission relies on a figure of 28%. NPRM, at ¶29.

establish nondiscriminatory rules and guidelines to ensure the development and survival of competitors. The long distance industry provides an excellent example. Competition in the long distance industry has resulted in enhanced and ubiquitous long distance service, lower rates, universal access, competitive wireless services and countless other advancements that benefit consumers. All of these developments resulted directly from, and would not have been developed but for, the necessary changes in laws and regulations that released the long distance industry from the monopoly stronghold and resulted in the deployment of multiple long distance facilities-based networks.

Adelphia urges the Commission to affirmatively establish rules that will permit MTE consumers to subscribe to the carrier of *their* choice, and will allow the market to determine a carrier's success. In light of its own experiences, Adelphia recommends that initially the following basic rules be adopted:

1. If a building owner controls inside wire that is connected to the facilities of any telecommunications carrier and used to provide interstate telecommunications services to the premises of customers (other than the building owner itself), then the building owner must permit any other telecommunications carrier to connect its facilities to that inside wire at the demarcation point upon request of a customer located in the building, on nondiscriminatory rates, terms and conditions.

2. Building access rates must be related to the cost of access and must not be inflated by the building owner so as to render competitive service within an MTE cost prohibitive.

3. A building owner must not require a telecommunications carrier to share a percentage of the gross revenue derived from providing telecommunications service to MTE end-users as a condition or price of access.

4. A building owner must not penalize or charge a tenant for requesting or receiving services from a competitive carrier.

Adelphia understands that this are basic rules without detailed. As such, these rules will not hinder innovation and will provide the flexibility to develop cost effective ways to reach MTE end-users.

Adoption of these rules on a national scope is essential to ensuring that MTE consumers do not wait any longer for access to advanced, competitive services. In its NPRM, the Commission claimed that "*several* other states have enacted legislation or taken regulatory action to prevent building owner from discriminating or demanding unreasonable payments or conditions with respect to access by telecommunications service providers."[6] To the contrary, only two states, Connecticut and Texas, have enacted legislation.[7] Two other states, California and Ohio, have adopted administrative regulations.[8] Therefore, in total only four states have addressed building access,[9] despite numerous efforts by CLECs at the state level requesting attention on the building access

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[6]NPRM, at ¶54 (emphasis added).

[7]Conn. Gen. Stat. § 16-2471 (1997); Texas Public Utility Code § 54.259;

[8]*Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, Decision, D.98-10-058 (CA PUC, Oct. 26, 1998); *Department's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wiring*, 1994 Ohio PUC LEXIS 778 (1994).

[9]It should be noted that the mere existence of state legislation or administrative rules in these four states does not signify the adequacy or effectiveness of such legislation or rules.

problem. Clearly, the slow pace of progress toward fulfilling Congress' mandate for local competition will continue until this Commission takes action.

III. THE COMMISSION HAS AMPLE AUTHORITY TO MANDATE NONDISCRIMINATORY ACCESS

The Commission has jurisdiction over the inside wiring in a building and, therefore, may establish rules governing the use, maintenance, and operation of that wiring. The Commission's authority stems from its jurisdiction over facilities used for interstate communications, even if those facilities may physically be intrastate or local.[10] Indeed, the Commission exercised its authority over inside wiring when it adopted the rules and regulations over inside wiring found in Part 68 of the Commission's rules.[11] The Commission's regulations governing the terms and conditions under which customers may connect customer premise equipment, including inside wiring, to the telephone network are a direct result of the Commission's jurisdiction in this area.[12]

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[10]Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp., 7 FCC Rcd 1619, 1621 (1992) (quoting New York Tel. v. FCC, 631 F.2d 1059, 1066 (2d Cir. 1980)); *see also* Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 699 (1st Cir. 1977); MCI Communications Corp. v. AT&T, 369 F. Supp 1004, 1028-1029 (E.D.Pa. 1974), *vacated on other grounds*, 496 F.2d 214 (3d Cir. 1974). *See* NARUC v. FCC, 746 F.2d 1499 (D.C.Cir. 1984) ("The dividing line between the regulatory jurisdictions of the FCC and state depends on 'the nature of the communications which pass through the facilities [and not on] the physical location of the lines'") (citations omitted); *id.* at 1498 ("[e]very court that has considered the matter has emphasized that the nature of the communications is determinative rather than the physical location of the facilities used").

[11]*E.g.* 47 C.F.R. §§ 68.213 and 68.215 (1997).

[12]*See* Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, n.4 (1986). *See also* Maryland Public Service Comm'n v. FCC, 909 F.2d 1510 (D.C.Cir. 1990); California v. FCC, 905 F.2d 1217 (9th Cir. 1217); Texas Public Utility Comm'n v. FCC, 886 F.2d 1325, 1331 (D.C. Cir. 1989); National Association of Regulatory Commissioners v. FCC, 880 F.2d 422, 429 (D.C.Cir. 1989); North Carolina Utilities Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S.

Pursuant to this authority, Adelphia recommends that the Commission adopt rules as described above requiring building owners to provide nondiscriminatory access to inside wiring under their control, as a condition of attaching that wiring to the facilities of any telecommunications carrier. The mandatory access rule provides that, if a building owner controls inside wire that is connected to the facilities of any telecommunications carrier and used to provide interstate telecommunications services to the premises of customers (other than the building owner itself), then the building owner must permit any other telecommunications carrier to connect its facilities to that inside wire at the demarcation point upon request of a customer located in the building, on nondiscriminatory rates, terms and conditions. Such rule would not raise any Fifth Amendment "takings" issue, since they would not require landlords to permit physical occupation of their property by any carrier. Indeed, this proposal would not require landlords to connect their buildings to telecommunications services at all - - the nondiscrimination requirement would apply only if a landlord *chooses* to attach its inside wiring to a regulated telecommunications network. A requirement that a property owner offer access to certain facilities on a nondiscriminatory basis once it chooses to use those facilities in connection with a regulated service is not a "taking."[13]

In the event the Commission finds that a taking has occurred, the only constitutional issue is whether the compensation provided to the building owner for the taking of non-rentable space is

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1027 (1976); North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

[13]*F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 107 S.Ct. 1107 (U.S. 1987); *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 112 S.Ct. 1522 (U.S. 1992).

just.[14] Reasonable, nondiscriminatory compensation would require that the building owner charge the CLEC the same rate it charges the ILEC. If the building owner charges the ILEC a nominal sum or zero, then the building owner must extend the same charge to all competitive carriers. If the ILEC in the building is paying for access, then that rate applied to all carriers using the facilities is constitutionally sufficient. Thus, it is not necessary for the Commission to determine compensation; however, the Commission must require that the building owner apply compensation on a nondiscriminatory and reasonable basis.

IV. CONCLUSION

For these reasons, Adelphia urges the Commission to adopt national nondiscriminatory access rules applicable to building owners, which are necessary to fulfill Congress' competitive mandate.

Respectfully submitted,

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August 27, 1999

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[14] *Lorestto v. Teleprompter Manhattan CATV Corp., et al.*, 458 U.S. 419 (1982).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered this 27th day of August, 1999, to the following:

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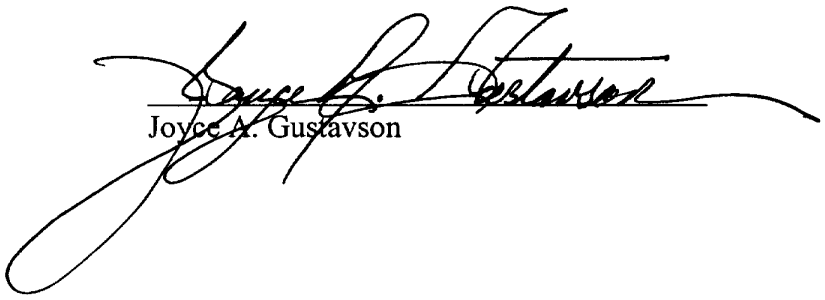

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